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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Revision of Rules and Policies)	IB Docket No. 95-168
for the Direct Broadcast)	PP Docket No. <u>93-253</u>
Satellite Service)	

COMMENTS OF
PRIMESTAR PARTNERS L.P.

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SUMMARY

The Commission's NPRM in this proceeding purports to foster at least two primary objectives -- provide prompt DBS service to the public and promote competition. If these objectives were truly paramount, however, the Commission never would have affirmed the International Bureau's decision to reclaim the orbital slots and channels at 110° W.L. assigned to Advanced Communications Corporation ("Advanced"). Through arrangements among Advanced, Tempo DBS, Inc. ("Tempo") and PRIMESTAR Partners L.P. ("PRIMESTAR"), the Advanced channels at 110° W.L. would have been used to provide DBS service to the public and meaningful competition to existing DBS providers by early next year.

Despite the repeatedly stated desire to implement a method for reassigning the Advanced channels on an expedited schedule, and despite the absence of any factors warranting fundamental and substantial DBS policy changes, the Commission, through the NPRM, has decided to embark on a comprehensive, unnecessary and likely litigious rewrite of the rules that have governed the DBS service for 13 years. Thus, the potential results of the proposed orbital/spectrum reallocation scheme set forth in the NPRM, and the complexity of the NPRM itself, belie the stated objectives of quickly inaugurating new DBS service and fostering competition among DBS providers.

PRIMESTAR is confident that, because the Commission ignored its own fundamental principles in reclaiming the Advanced channels, PRIMESTAR, Advanced and Tempo will prevail in their pending appeals of the Advanced Order, thus eliminating the need to reallocate the Advanced channels. To the extent there are other DBS spectrum resources that are reclaimed and available for reallocation, PRIMESTAR concurs that the Continental decision is outmoded and should be set aside in favor of another allocation mechanism.

In the interest of expediting use of DBS orbital slots and channels, PRIMESTAR submits that the Commission should adopt auctions as the method to allocate DBS channels lawfully reclaimed from DBS permittees or otherwise made available for domestic use. The Commission should not delay this proceeding, however, out of concern for its authority to auction DBS channels for international use. Instead, the Commission should pursue separately the flexibility to use domestic services for international purposes and accord the same rights to all DBS operators licensed by the U.S.

In light of its determination in the Advanced Order that the "new era" of DBS requires more diligent efforts of DBS permittees, the Commission should toughen its due diligence milestones, incorporating accelerated deadlines for contracting and construction and providing for periodic audits of progress toward construction and operation. The Commission should extend its aggressive monitoring program to all DBS permittees, whether new or existing.

The NPRM's proposal to permit DBS operators to use up to fifty percent of their capacity for non-DBS satellite services undermines the Commission's continued commitment to the development of a thriving DBS service capable of providing technically innovative, multichannel programming to the majority of Americans. PRIMESTAR urges the Commission to reaffirm its commitment to DBS and to eschew any policy that would carry a substantial risk of foreclosing the growth of this service. There is simply no justification for the de facto reallocation of DBS spectrum proposed in the NPRM given DBS's proven viability. Use of DBS capacity, therefore, should be limited to the provision of DBS service; any ancillary use should be confined to that permitted under current policies.

While purporting to promote competition, the NPRM's proposals would cause certain DBS providers to operate under debilitating constraints, if not preclude their entry into the DBS arena altogether. Specifically, the Commission attempts to revisit DBS/cable cross-ownership, impose expanded and restricted marketing limitations on certain DBS providers, impose DBS channel concentration rules, and extend to DBS the program access rules established for cable television by the 1992 Cable Act. These proposals lack support in the record and in reality, and are designed to combat competitive conditions which do not now exist and which are unlikely ever to occur.

To the extent the "new era" of DBS overregulation is directed at PRIMESTAR and its partners, it is wholly without merit. Given the over \$1 billion dollars committed by PRIMESTAR's partners in developing PRIMESTAR's DTH service, PRIMESTAR has the incentive and the ability to compete vigorously in the DBS arena and in the broader market for the delivery of multichannel video programming services. Further, adequate market protections, in the form of aggressive, non-cable affiliated DBS providers, proscribe the need for additional regulation.

Given the nature of the DBS service, the Commission's "structural proposals" further no pro-competitive interest. PRIMESTAR submits that spectrum aggregation limitations are unnecessary, but, to the extent the Commission finds them warranted, a cap of no less than 32 channels, applicable to all DBS operators, without limitation as to the number of full-CONUS orbital locations at which a DBS operator may hold the channels, would sufficiently promote diversity and competition. The proposed rules for attribution of interests are overly restrictive and would not withstand judicial scrutiny.

The Commission's proposed conduct limitations also are unwarranted. The Commission has offered no evidence to support the adoption of complicated regulations that will hinder, not facilitate the entry and viability of competitive DBS operators. PRIMESTAR opposes, therefore, the Commission's proposals to proscribe exclusive marketing arrangements with

MVPDs for the distribution of DBS services, to expand the program access rules to prohibit exclusive arrangements between DBS operators and programmers, to extend the program access rules to "wholesale" DBS and to place limits on the wholesale distribution of programming.

PRIMESTAR concurs that the Commission has authority to allocate DBS frequencies through competitive bidding. In the case of the Advanced frequencies, however, the Commission has failed to satisfy its statutory obligation under Section 309(j) of the Communications Act to rapidly deploy DBS service and to avoid mutual exclusivity. To the extent the Advanced channels are available for auction, PRIMESTAR concurs that those at 110° and 148° should be offered sequentially, through an oral auction with \$5 million minimum increments and some short breaks at periodic points during the auction to provide bidders a chance to assess the circumstances and consult with principals, if necessary. A \$10 million upfront payment, and a minimum opening bid of \$10 million, should be required to dissuade financially unqualified bidders.

Finally, in light of the pending appeals of the Advanced Order, the Commission must establish that any entity other than PRIMESTAR or Tempo, that is successful at auction, proceeds with construction of its DBS system at its own risk. Further, the Commission must make clear that if PRIMESTAR/Tempo/Advanced prevail on appeal, the Advanced frequencies immediately will revert to Advanced and any monies paid at auction will immediately be refunded.

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PRIMESTAR Partners L.P. ("PRIMESTAR"), by its attorneys, and pursuant to Section 1.415 of the Commission's Rules (47 C.F.R. § 1.415), hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. INTRODUCTION

A. The Setting of the NPRM

The Commission's NPRM stems directly from a related Commission decision to reclaim the channels and orbital locations formerly held by Advanced Communications Corporation ("Advanced") for use in the Direct Broadcast

¹ Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking in IB Docket No. 95-168, PP Docket No. 93-253, FCC 95-445 (released October 30, 1995) ("Notice" or "NPRM").

Satellite ("DBS") service. The Commission reclaimed these spectrum resources, citing Advanced's purported failure to meet the Commission's due diligence standards for DBS permittees.²

In the Advanced Order, decided on a three-to-two vote with two strong dissenting opinions, the Commission completely ignored the undisputed fact that, had the Advanced applications been approved, the Advanced orbital position and channels at 110° W.L. would have been used to provide service to the public early next year.³ Despite the majority's assertions that the Bureau Decision, which the majority affirmed, was "consistent with our precedent,"⁴ in fact, the Commission and the International Bureau did not even address the Commission's primary objective in evaluating extensions of DBS permits: "In any . . . consideration [of DBS permit extension requests], the public interest in the prompt

² Advanced Communications Corp., FCC 95-428 (adopted October 16, 1995) ("Advanced Order"). The Advanced Order upheld a decision by the Chief of the Commission's International Bureau that denied Advanced's request to extend the time to complete its DBS system for operation at 110° W.L. and dismissed related applications to assign the Advanced authorization to Tempo DBS, Inc. ("Tempo"). Advanced Communications Corporation, 77 RR 2d 1160 (DA 95-944, April 27, 1995) ("Bureau Decision"). The Advanced Order also reclaimed the 24 channels Advanced held at 148° W.L.

³ Through arrangements among Advanced, Tempo and PRIMESTAR, DBS satellites would have been launched into the Advanced orbital position at 110° W.L. in 1996, and PRIMESTAR would have expanded its existing medium-power direct-to-home ("DTH") satellite service to provide approximately 200 channels of video, audio and data services directly to consumers.

⁴ Advanced Order at ¶ 17.

initiation of service will continue to be a primary concern."⁵

In addition, the Commission went to great lengths in an attempt to distinguish its harsh treatment of Advanced from numerous other cases in which the Commission routinely had approved applications for extensions and assignments of DBS construction permits.⁶ In the end, however, as Commissioner Quello observed, "the majority has set up a series of tenuous and tortured distinctions without any difference in claiming that Advanced's situation is markedly different from that of other permittees in cases with markedly similar facts."⁷

Because of the Commission's arbitrary actions in ignoring its own fundamental principles justifying DBS permit extensions and in creating patently irrelevant distinctions in its zeal to reclaim the Advanced channels, PRIMESTAR is confident that Tempo, PRIMESTAR and Advanced will prevail in

⁵ United State Satellite Broadcasting, Inc. ("USSB I"), 3 FCC Rcd 6858, 6861 (1988). See also Dissenting Statement of Commissioner James H. Quello to Advanced Order ("Quello Dissent") ("Commission must weigh the delay in scheduled implementation of service against the claimed public interest benefits"); Directsat Corp., 10 FCC Rcd 88 (1995) (for profit sale of Directsat to EchoStar will promote "the expeditious inauguration of new service"); United States Satellite Broadcasting Co., 7 FCC Rcd 7247, 7249 (1992) ("USSB II") (totality of the circumstances test applied to extension requests must necessarily consider the "ultimate goal of service to the public").

⁶ E.g., Directsat Corp., 10 FCC Rcd 88 (1995); USSB II, 7 FCC Rcd 7247 (1992).

⁷ Quello Dissent at 5.

their appeals of the Advanced Order,⁸ and, ultimately, but belatedly, the Advanced channels at 110° W.L. will be made available to Tempo and PRIMESTAR under the arrangements proposed to the Commission almost 14 months ago. Thus, to a large extent, the effort being undertaken in the NPRM to establish procedures to reallocate the Advanced DBS channels is likely to be undone. Nevertheless, PRIMESTAR submits its comments herein in recognition of the Commission's wishes to adopt some DBS channel allocation procedures for future channels that may become available, and to address the NPRM's proposals to substantially and fundamentally rewrite the rules that have governed DBS since the service was created 13 years ago.⁹

B. The Philosophy of the NPRM

Having, in the Advanced Order, ignored completely its previously stated primary objective of expediting service to

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- ⁸ Advanced filed a Notice of Appeal of the Advanced Order with the United States Court of Appeals for the District of Columbia Circuit on October 31, 1995. Advanced Communications Corporation, Appellant v. Federal Communications Commission, Appellee, No. 95-1551. PRIMESTAR and Tempo filed Notices of Appeal, a Joint Motion for Consolidation of Appeals and a Joint Motion for Expedited Consideration on November 3, 1995. PRIMESTAR Partners L.P., Appellant v. Federal Communications Commission, Appellee, No. 95-1561; Tempo DBS, Inc., Appellant v. Federal Communications Commission, Appellee, No. 95-1560. Both the Commission and MCI Telecommunications Corporation ("MCI") are on record supporting the need for an expedited appeal of the Advanced Order. Response of Federal Communications Commission to Joint Motion for Expedited Consideration, Nos. 95-1560, 95-1561; MCI Response to Joint Motion for Expedited Consideration, Nos. 95-1560, 95-1561.
- ⁹ Direct Broadcast Satellite Service, 90 FCC 2d 676 (1982) ("DBS Order").

the public, and having reclaimed the Advanced DBS channels, the Commission now is attempting to reconcile its positions by embarking on the NPRM, designed to "usher in a new era of DBS service to the public, in which DBS orbital/channel assignments are swiftly utilized and the public reaps the full benefit of DBS spectrum resources."¹⁰ Yet, the potential results of the proposed orbital/spectrum reallocation scheme and the complexity of the NPRM belie the stated objective of quickly inaugurating new DBS service and competition. Under the most optimistic of circumstances (assuming PRIMESTAR and Tempo do not prevail at the auction and no delays otherwise are encountered) DBS service to the public using the 110° W.L. resources will not be available for at least four years.¹¹ Moreover, instead of focusing solely on an efficient spectrum reallocation process, the NPRM seeks virtually to rewrite the DBS rules that were established 13 years ago, a complex process of dubious

¹⁰ Advanced Order at ¶ 74.

¹¹ Through its arrangements with Tempo, PRIMESTAR has access to the only DBS satellites that could be used to provide service at 110° W.L. in the near future. PRIMESTAR and Tempo have stated clearly that those DBS satellites will not be available to any other entity that might obtain rights to use the Advanced channels at 110° W.L. See letter to Scott Blake Harris, Chief, International Bureau, from David P. Beddow, Tempo DBS, Inc., August 24, 1995. Thus, the ultimate licensee of the 110° W.L. resources, if it is not PRIMESTAR or Tempo, will have to construct new DBS satellites.

necessity or value likely to create confusion and litigation.¹²

The Commission initially imposed few regulations on DBS due to uncertainty as to how the new and highly risky service would develop. The Commission stated that its decision to impose "minimal regulatory requirements" would allow DBS operators to "experiment with service offerings and methods of financing to find those that would be most beneficial to viewers."¹³ The Commission further stated that placing undue constraints on the characteristics of DBS service might "reduce the desirability of this service to the public and increase the DBS operators' costs and risks."¹⁴ Now, after 13 years, during which time only one entity (a subsidiary of the country's largest corporation) has launched a DBS satellite, and based on little more than idle speculation, the Commission assumes a need to complicate greatly DBS regulation, in a manner that will hinder, not facilitate, the entry of competitive DBS operators.

As the Commission is fully aware, PRIMESTAR is one of those potential DBS operators and is currently offering a

¹² Commissioner Quello observed in his dissent to the Advanced Order that "it would only be through extreme luck bordering on divine intervention that the unrealistic timetable set forth in the majority decision is likely to be achieved." Quello Dissent at 2. Commissioner Quello's words are even more prophetic given that the NPRM has expanded beyond a discrete process for channel allocations to a review of the very fundamentals of the Commission's DBS regulatory philosophy.

¹³ DBS Order, 90 FCC 2d at 706.

¹⁴ Id. at 707.

satellite program service to more than 800,000 subscribers over non-DBS facilities in direct competition with the two current DBS operators.¹⁵ PRIMESTAR's efforts to offer its service over DBS have been thwarted not only by the Advanced Order but now by the plethora of regulations proposed in the NPRM which appear designed to handicap PRIMESTAR.

Specifically, without a scintilla of evidence, and based solely on speculative assumptions, the Commission proposes to place severe restrictions on participation in DBS by financially capable entities that have other multichannel video program distribution ("MVPD") operations, including the manner in which they market and distribute their service. Moreover, the Commission, in effect, is proposing to require DBS operators to assume responsibility for ensuring that certain programmers grant access to their services to a broad range of MVPD competitors. In addition, the Commission proposes to impose, for the first time, limitations on the amount of DBS resources that certain entities may own or control. Confounding its stated desire of improving DBS competition, the Commission actually proposes to expand the potential uses of DBS spectrum essentially to convert the service from DBS to a multiuse transmission capability.

¹⁵ PRIMESTAR provides its service using the Ku-1 medium power fixed satellite operated by GE American Communications, Inc. Ku-1 is projected to reach its end of useful life in late 1996. The Bureau Decision and the Advanced Order have wreaked havoc on PRIMESTAR's plans to continue and enhance its service by migrating to DBS satellites prior to Ku-1's end of life.

PRIMESTAR submits, as a general matter, that the Commission's proposals to regulate DBS operators heavily have no rational basis and amount to nothing more than the Commission's attempt to handicap the entry of viable competitors into the DBS arena, including PRIMESTAR and its partners. PRIMESTAR submits that most of the proposals put forward by the Commission should be rejected

[l]est we inhibit the viability of a service that still needs relief from undue regulatory constraints that could inhibit its growth -- and by growth I mean the growth of a service that includes numerous DBS providers that can compete with each other as well as with other multichannel video programming providers. 16

II. THE COMMISSION SHOULD SET ASIDE THE CONTINENTAL DECISION

In its NPRM, the Commission proposes to use competitive bidding to award the DBS spectrum reclaimed from Advanced, and to award permanently any other DBS orbit/spectrum resources whether newly created¹⁷ or reclaimed. To implement this proposal with respect to the allocation of reclaimed DBS channels would require the Commission to set aside its ruling

16 Quello Dissent at 1-2. Commissioner Chong has expressed the view that: "minimal regulation is generally best, especially when there is competition in the market. It is my hope that our final rules for this service will reflect our overarching goal for the video services market -- vibrant competition with minimal government intervention." NPRM, Separate Statement of Commissioner Rachelle B. Chong.

17 The Commission has indicated that it may seek modifications to the International Telecommunication Union ("ITU") Region 2 Plan for the Broadcast Satellite Service ("BSS Plan") to accommodate additional DBS orbit/spectrum resources for U.S. licensees. NPRM at ¶¶ 51-52.

in Continental Satellite Corp.¹⁸ In Continental, the Commission had determined "that existing DBS permittees would have the first right to reassigned DBS channels and associated orbital locations in the event that such channels reverted to the public due to cancellation or surrender of a DBS construction permit."¹⁹

To the extent that there are DBS resources available for reassignment, PRIMESTAR concurs with the Commission's conclusion that the methodology outlined for reallocation in Continental is outmoded. For example, in the case of the Advanced resources, dividing fifty-one channels among six remaining permittees would in no way facilitate service to the public. Instead, it simply would force permittees to engage in protracted negotiation as each attempted to aggregate the capacity and economic efficiencies necessary to operate a viable system. PRIMESTAR concurs, therefore, that there are cogent reasons for the Commission to abandon the reallocation scheme established in Continental and adopt a change in policy.²⁰

¹⁸ Continental Satellite Corp., 4 FCC Rcd 6292, 6299 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990) ("Continental").

¹⁹ NPRM at ¶ 2.

²⁰ Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

III. PROPOSED SERVICE RULES

A. The Commission Should Provide for Maximum Flexibility as Concerns International DBS Service

The Commission's NPRM requests comment on whether the United States has the authority to auction DBS permits which ultimately may include the authority to provide international DBS service.²¹ This question may become relevant in view of the proceeding currently pending at the Commission which looks toward the relaxation of distinctions between domestic and international satellite services.²²

In whatever manner the Commission resolves its separate proceeding on domestic/international satellite use, the pendency of that proceeding should not delay the Commission's efforts here. Serious issues are presented with respect to the auctioning of international orbital resources, but it is not necessary to settle these issues now. In the interest of expedience, the Commission should resolve in this proceeding to adopt auctions as the method to allocate DBS channels lawfully reclaimed from DBS permittees. PRIMESTAR urges the Commission, however, to pursue vigorously the flexibility of U.S. DBS licensees to provide international services and to ensure that the same rights are accorded to all DBS operators

²¹ NPRM at ¶ 24.

²² Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, IB Docket No. 95-41, FCC 95-146 (Released April 25, 1995).

licensed by the United States regardless of how the operators secured their DBS authorizations.

**B. The Commission Should Strengthen
Its Proposed Due Diligence Milestones**

The Commission proposes to award new, initial DBS construction permits on a conditional basis, subject to cancellation where such permittees do not satisfy new due diligence requirements. Under the proposal set forth in the NPRM, new permittees would be required to contract for satellite construction within one year, construct their first DBS satellite within four years of authorization, and complete construction of their DBS system within six years. Existing due diligence requirements and precedent would apply to construction permits already issued, unless assigned or transferred.²³

It is ironic that the Commission would reclaim the DBS channels and orbital positions awarded to Advanced, in part based on a determination that the "last four years have ushered in [a] new era" in DBS²⁴ that requires more diligent efforts of DBS permittees, and yet not extend more stringent requirements to existing permittees, some of whom have held their authorizations as long as Advanced,²⁵ without

²³ NPRM at ¶ 27.

²⁴ Advanced Order at ¶ 24.

²⁵ Advanced received its DBS permit in 1984. Satellite Syndicated Systems Inc., 99 FCC 2d 1369 (1984). USSB, for example, has held its DBS permit since 1982. CBS Inc., 92 FCC 2d 64 (1982).

completing all of their authorized facilities.²⁶ Moreover, while the due diligence standards proposed for new permittees have some stricter milestones, they do not support the Commission's professed concern that the time has come for DBS permittees to move forward with dispatch. In short, PRIMESTAR submits that the proposed due diligence standards should be strengthened and made applicable to all permittees.²⁷

Specifically, the Commission should shorten the contracting period to six months, require completion of the first satellite in three and one-half years from permit award, and require complete system operation within five years of award.²⁸ Further, PRIMESTAR submits that the

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- ²⁶ The fact remains that only two DBS permittees, Hughes and USSB, have launched service, USSB not by completing satellite construction, but by obtaining transponder capacity from Hughes. None of the remaining six permittees has launched service, and no permittee has begun actual construction of a satellite for use in its western orbital position. See, e.g., Semi-Annual Reports filed by Continental (June 19, 1995), DBSC (July 13, 1995), Directsat (June 20, 1995), Dominion (February 26, 1995), EchoStar (June 20, 1995), Tempo Satellite (May 22, 1995) and USSB (April 25, 1994).
- ²⁷ A stricter due diligence standard is even more important given the Commission's decision (i) to strip Advanced of its channels when Advanced was at the threshold of providing service; (ii) to embark on a new reallocation process; and (iii) potentially to award the Advanced channels to an entity that would have to start a satellite construction and launch program from the beginning. This delay only works to the advantage of the existing DBS operators.
- ²⁸ The Commission recognizes that the average DBS satellite takes "from two to three years" to build. NPRM at ¶ 27. It is fairly typical for multiple satellites making up a DBS system to be delivered on six month rolling windows.

Commission's due diligence procedures should provide for periodic audits by the Commission of progress toward construction and operation. These audits should incorporate specific construction and substantial payment criteria, and, if necessary, involve Commission staff visits to or contact with spacecraft manufacturers to verify construction programs. The Commission should reserve the right to revoke the permittee's authorization at any time it finds progress to be deficient, and not wait until expiration of the permit to make such a judgment.

As noted above, this aggressive due diligence monitoring program should apply to all DBS permittees, whether new or existing. Although, unless the Advanced Order is reversed quickly on appeal, the Commission cannot hope to achieve the rapid service to the public that would have accrued from the Advanced/Tempo/PRIMESTAR transactions, by fortifying its due diligence milestones, the Commission perhaps can mitigate further damage to the development of true DBS competition.

C. The Commission Should Not Alter Its Policies Regarding Use of DBS Capacity for Other Services

In 1982, the Commission set aside an allocation of spectrum for the DBS service (and in the process displaced large numbers of existing users of the spectrum), based on DBS's potential "to provide extremely valuable services to the American people."²⁹ The benefits anticipated included

²⁹ DBS Order, 90 FCC 2d at 680.

improved service to remote areas, additional channels of service throughout the country, a greater variety of programming better suited to individual tastes, technically innovative services and expanded non-entertainment services.³⁰

In two decisions since the 1982 DBS Order, the Commission has granted existing DBS permittees some flexibility in the use of their assigned channels for non-DBS services. In those decisions, the Commission permitted non-DBS uses only during the start-up phase of a DBS service and throughout the life of a first-generation satellite, provided that DBS service was initiated during the first generation.³¹ After the first license period, a DBS licensee could provide non-DBS service for up to one-half of the day on transponders also used for DBS service.³² These policies were adopted when DBS was a nascent, struggling service and were designed to increase early revenues to support the high up-front costs of launching a DBS system and to provide a cushion to reduce the risk of loss to investors given the uncertainty surrounding the potential viability of the DBS service.³³ In

³⁰ Id.

³¹ Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service, 6 FCC Rcd 2581 (1991) ("Potential Uses of DBS"); United States Satellite Broadcasting Co., 1 FCC Rcd 977 (1986) ("USSB"), recon. denied, 2 FCC Rcd 3642 (1987).

³² USSB, 2 FCC Rcd at 979.

³³ Id.

creating this flexibility, and in denying the permanent authorization of alternative uses of DBS frequencies,³⁴ the Commission consistently reiterated its commitment to "the development of DBS as an important potential addition to the availability, diversity and technical enhancement of video programming;"³⁵ the Commission steadfastly refused to adopt any policy that would carry a "substantial risk" of foreclosing or prejudicing future developments in the provision of DBS service.³⁶

Now, the Commission in the NPRM is proposing to permit even greater flexibility in the use of DBS spectrum, recommending that up to one-half of a DBS licensee's total channel capacity could be used for non-DBS purposes. PRIMESTAR submits that this proposal is tantamount to a de facto reallocation of DBS spectrum, and can neither be reconciled with the Commission's long standing objectives for DBS nor justified by the facts and circumstances that characterize the DBS service as it currently exists. Indeed, this proposal directly contradicts the Commission's notion that a "new era" in DBS requires permits to be revoked summarily when service using those permits is only months away. Moreover, the proposal calls into question the

³⁴ Potential Uses of DBS, 6 FCC Rcd at 2583.

³⁵ Id.

³⁶ Id.

Commission's continued commitment to promoting the viability of DBS, and suggests that there may exist an underlying motive to make this spectrum attractive to a larger number of "deep pockets," who would bid for the spectrum regardless of their intention to provide DBS service.³⁷

No significant changes or events have occurred which undermine the Commission's findings or conclusions that its support for DBS service should not be abandoned in favor of spectrum reallocation or more flexible spectrum use. If anything, the advent of digital compression, the unprecedented growth of DirectTV/USSB since the launch of these DBS services just over one year ago, and the Commission's own proclamation of a "new era" of DBS require that the Commission not undermine the commitment to DBS and its policies that the spectrum resources allocated to DBS be devoted first and foremost to that service.

While the temporal flexibility adopted by the Commission in USSB and Potential Uses of DBS has served and continues to serve a valuable purpose, any expansion of permissible non-

³⁷ MCI, which has vociferously expressed interest in the DBS orbital slots and channels reclaimed from Advanced, to the tune of \$175 million, may indeed have such intentions. See Letter from Gerald H. Taylor, President of MCI, to Hon. Reed E. Hundt (dated October 10, 1995); *MCI Hoping To Enter Satellite TV Market; Firm Urges U.S. To Auction License*, The Washington Post, September 26, 1995. It is inconceivable why a DBS newcomer, without benefit of experience, a programming line-up, or a satellite, for that matter, would place such value on spectrum it intended to use for DBS services given the market lead its potential competitors inevitably will achieve.

DBS uses is unnecessary and threatens to compromise the goal of a competitive DBS service. Given the increasing viability of the DBS service after 13 years, there exists no reason for the Commission to institute the type of comprehensive spectrum reallocation proposed in the NPRM.

D. There Is No Justification for the Commission To Adopt "Pro-Competitive" Regulations Aimed at DBS Operators Affiliated with Non-DBS MVPDs

1. The Commission's Decision To Avoid Such Regulations Remains Valid

In what appears to be an overreaction to concerns expressed by certain parties in the Advanced proceeding, the Commission's NPRM wholeheartedly and without reason endorses the notions that an MVPD-affiliated DBS provider cannot be expected to compete vigorously with other MVPDs, and that such an entity would have the incentive and ability to engage in anti-competitive strategic conduct impeding other DBS providers who are competing with MVPDs.³⁸ As a result, the NPRM attempts to revisit DBS/cable cross-ownership, impose expanded and restricted marketing limitations on certain DBS

³⁸ Ironically, those who argued most strenuously in support of the Advanced Order, protesting that PRIMESTAR would not use the Advanced DBS resources to compete, were PRIMESTAR's potential competitors. These are the very entities who would benefit the most if PRIMESTAR could not enter the DBS arena and mount an aggressive DBS marketing effort. If PRIMESTAR's competitors truly believed that PRIMESTAR would not compete, logic would compel their silence or support on the matter of overturning the Advanced Order and allowing the Advanced/Tempo/PRIMESTAR arrangement to proceed. In truth, these competitors continue to attempt to shut PRIMESTAR out of the DBS arena because of the competitive threat PRIMESTAR poses to their own domination of the DBS service.